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1501 K STREET, N.W.
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TELEPHONE 202 736 8000
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WRITER'S DIRECT NUMBER
(202) 736-8067

WRITER'S E-MAIL ADDRESS
tbartucz@sidley.com

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COMMENTS: Attached please find the Tunney Act comments on the Microsoft settlement of Griffin B. Bell, Edwin Meese III, and C. Boyden Gray. An electronic copy will also be submitted.

January 28, 2002

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Re: Microsoft Settlement

Dear Ms. Hesse:

We believe the Revised Proposed Final Judgment ("RPFJ") that the federal government and some of the plaintiff states have reached with Microsoft should be adopted, and that the proposals of the nine states that continue to pursue this litigation (the "Litigating States") should be rejected. That is so, in our view, for four main reasons.

First, the RPFJ will serve the central goal of antitrust law – benefiting consumers – far better than any of the states' proposed remedies. Most importantly, it allows Microsoft to continue selling a single, uniform operating system under the Windows name. This will directly benefit all the consumers who have relied on Windows' continued availability when deciding which computer and software to purchase.

At the same time, the RPFJ will increase the range of choices available to consumers by requiring Microsoft to enable both computer manufacturers and end-users to turn off Microsoft's middleware products such as its Internet browser, instant messaging tools, media player, and email utilities. Consumers will therefore be free to sample and choose among a variety of middleware utilities from various companies. The RPFJ thus strikes a sensible balance between the goal of giving rival middleware producers access to Microsoft's customers, and the equally important goal of avoiding anything that would destabilize the Windows platform on which consumers – and indeed most of the software industry – depend.

The Litigating States' proposals strike no such balance. For example, the Litigating States would require Microsoft to sell stripped-down versions of Windows at court-mandated prices, without regard for the technical advantages of integrating middleware and operating system functions, or for the importance of a stable, uniform operating system. Computer manufacturers would then be able to patch competitors' middleware into the Windows system and sell the hybrid product to consumers without giving them any guidance as to how to restore their computers to the original Windows settings. This would effectively destroy the Windows standard. That will not benefit consumers; it will harm them. And it is anti-competitive, not pro-competitive.

Second, the RPFJ is narrowly tailored to the findings of illegality affirmed by the Court of Appeals. The RPFJ thus enjoins the types of conduct held illegal by that court – primarily certain exclusive dealing arrangements and threats of retaliation – in language broad enough to preclude similar behavior, without losing sight of the limited Court of Appeals holding.

In contrast, many of the Litigating States' proposals have nothing to do with any of the issues in this case, much less the Court of Appeals' decision. For example, the Litigating States would require Microsoft to inform them sixty days in advance of any acquisition of technology or other intellectual property. Yet this "remedy" cannot be tied to any element of this case, let alone to any finding of liability that was affirmed on appeal. Other proposals are simply overbroad or unworkable, such as the proposal that Microsoft notify any software developer sixty days in advance of any action it intends to take that might have an impact on the interaction between the developer's middleware and Windows.

Third, the remedy in this case must be one that the federal courts can administer, not one that will turn the District Court into a regulatory agency. Again, the RPFJ strikes the needed balance. The Technical Committee and the Compliance Officer that it would install are unquestionably intrusive, but at least the Committee would properly make its reports to the plaintiffs, who then would decide what course to pursue.

By contrast, installing a Special Master with his own staff and the power both to investigate and to judge, as the Litigating States propose, would drag the federal courts into a prosecutorial and regulatory role that they are ill-suited to perform. The Litigating States' substantive proposals take a similar, regulatory approach. They would mandate product design and pricing, force Microsoft to distribute its competitors' products, and give Microsoft's rivals a mechanism to try to block any decision by Microsoft that they dislike.

Finally, we believe that entry of the RPFJ will respect and promote the primacy of the U.S. Department of Justice in enforcing federal antitrust law. To be sure, the States may have some role to play in this area. But it would be bad policy to allow a small group of state attorneys general to trump, in effect, the Department's decision to settle on reasonable terms an antitrust case that has such enormous implications for the national economy.

For all these reasons, we urge the District Court to enter the RPFJ as its final judgment in this case. We believe it would benefit consumers, effectively address the Court of Appeals' findings, and provide a workable resolution to this long-running litigation.

Sincerely,

Griffin B. Bell

Edwin Meese III

C. Boyden Gray